BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Children's Television Obligations	)	MM Docket No. 00-167
Of Digital Television Broadcasters	)	

To: The Commission

REPLY OF FRANK JASTRZEMBSKI TO OPPOSITION TO PETITIONS FOR RECONSIDERATION

Frank Jastrzembski, pursuant to Section 1.429 of the Commission's Rules, hereby replies to the Opposition to Petitions for Reconsideration filed March 23, 2005 by the Children's Media Policy Coalition (CMPC). In particular, I address the arguments of the CMPC in support of the Commission's recent decisions to change the well-established definition of "commercial matter" to include promotion of non-educational or instructional (E/I) children's programs and to regulate the display of website addresses during children's television programming. *Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 22943 (2004) ("*Report and Order*").

The Commission should reconsider its decisions in light of the many substantial and unchallenged arguments raised by petitioners in response to the *Report and Order*. Each decision is flawed legally, ill-conceived as a practical matter, and immaterial to the Commission's central purpose announced in the proposed rulemaking.

The FCC's new definition of commercial matter offends Congressional intent

In its Opposition, CMPC argues that the Children's Television Act of 1990 (CTA) provides the Commission with the authority to redefine commercial matter, as a means to modify the 10.5 and 12 minute commercial time limits. However, the legislative history of the CTA would suggest otherwise. Therein, Congress stated its intent that the definition of commercial matter should be consistent with the definition used in FCC Form 303. H.R. Rep. No. 101-385, at 15 (1989); S. Rep. No. 101-227, 21 (1989). This definition considered, but explicitly excluded same-channel promotions that do not promote a sponsor or receive consideration. Nothing has changed to alter Congress' declaration that same channel promotions are different than sister-station promotions and other promotions that receive genuine consideration and are not to be considered commercial matter subject to the 10.5 and 12 minute limits. *Id.* Therefore, it is *ultra vires* for

the FCC to revise the definition of commercial matter to include promotions that Congress clearly wanted excluded.

The Commission's newly adopted view that the consideration requirement is met by increased audiences following program promotions is an interpretation at odds with Congressional intent. *R & O*, para 58. The FCC's new stance is admittedly aimed at reducing programming interruptions. *R & O* at 56. While some might applaud this endeavor, unfortunately, implementing a new and novel theory of consideration to side-step Congressional mandates is not the proper course of action for the Commission. The Commission's reasoning, which was tenuous to begin with, is further weakened by the inconsistent treatment of E/I and non-E/I programming promotions. E/I promotions are not being similarly re-branded as commercial matter to encourage the airing of E/I promotions.

The CMPC asserts in its Opposition that the Commission is free to change the definition of commercial matter unless Congress gives a strong affirmative indication that it wishes to freeze the agency's interpretation in place. However, this is precisely what Congress did in passing the CTA. It referred to FCC Form 303 to define commercial matter and gave examples of promotions that were and were not advertisements to be limited in both House and Senate Reports. H.R. Rep. No. 101-385, at 15 (1989); S. Rep. No. 101-227, 21 (1989). Additionally, as several petitions for reconsideration have pointed out, counting program promotions as commercial matter

because they receive a form of indirect consideration from increased audiences would logically lead to curious and unintended results. One, children's programs themselves could be labeled commercials because they increase viewership. Two, any program that runs an internal promotion for currently showing or future episodes would be considered a program length commercial (PLC) subject to current rules which are quite stringent. Three, non-E/I broadcasters will now run cartoons uninterrupted by promos, while E/I programs are subject to unlimited E/I promotional interruptions; clearly Congress and the FCC would prefer the opposite result- uninterrupted core (E/I) programming.

Congress recognized the benefit and necessity of advertising dollars in supporting children's programming when it stated in Section 101 of the CTA that "…the financial support of advertisers assists in the provision of programming to children. Pub. L. N0. 101-437, 104 Stat. 996. Furthermore, Congress specifically stated that restraints in excess of the 10.5 and 12 minute commercial limits "might reduce the revenue available to support the acquisition and production of children's programming…These specific limits reflect 'an estimate of the amount of advertising time needed to make children's programming economically viable'" S. Rep. No. 101-227, at 20 (1989). The Commission's revised definition of commercial matter, and the regulation of website displays discussed below, will significantly affect the

revenue generating needs recognized by Congress of those broadcasting children's programming.

The FCC's new definition of commercial matter violates the APA

An agency may change its position on an issue. However, it must accompany a change with an explanation to satisfy the Administrative Procedure Act (APA). *Harrington v. Chao*, 280 F.3d 50, 58 (1st Cir. 2002). When an agency reverses its own policy, it must provide a sufficient explanation that is grounded in the evidence before the agency. *Reservation Tel. Coop. v. FCC*, 826 F.2d 1129, 1135 n. 4 (D.C. Cir. 1987). In the present case, the FCC has not adequately explained why same channel promotions are suddenly to be considered advertising that counts toward the CTA time limits.

As early as 1991 the FCC declared commercial matter to be air time sold for purposes of selling a product or service. *In the Matter of Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111 (1991). The advertiser was required to give some valuable consideration either directly or indirectly to the broad-caster as an inducement for airing the material. *Id.* The Commission stated it had reached a definition of commercial matter that "comports with marketplace realities and is crafted carefully to avoid encompassing noncommercial material." 1991 *Report and Order.*

Now, the FCC is changing the well-established rule by removing the required third-party component of consideration to regulate program content by discouraging the promotion of non-E/I programs. This is problematic as the docket in this proceeding does not put forth any evidence that since the CTA was enacted in 1990 the realities of the marketplace have changed or the length, interruptions or promotions of children's programs have changed in a manner outside the knowledge of Congress then or now. As such, the Commission has failed to explain or establish in the record a basis for reversing its long-standing position.

The Commission has also failed to show how the new definition of commercial matter will achieve its stated goals of reducing interruptions or commercialization of children's programming. In this case, the Commission has revealed its motivation for changing the definition of commercial matter, but not the data or evidence supporting the change or indicating that the sought after result might be accomplished. Such an omission renders the action arbitrary and capricious and is fatal under the APA. *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977). Therefore, the Commission should restore the definition of commercial matter to comply with the APA.

The FCC's new rules regulating the display of website addresses violate the notice requirements of the APA.

The requirement of notice and a fair opportunity to be heard is basic to

admin-istrative law. *See* K. Davis, *Administrative Law Treatise* § 6.1 at 450 (2d ed. 1978).

Section 4 of the Administrative Procedure Act (APA) requires that the notice in the Federal Register of a proposed rulemaking contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (1982). There is no question that an agency may promulgate a final rule that differs in some particulars from its proposal. Otherwise the agency "can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, (4th Cir. 1985) citing *International Harvester Co. v. Ruckelshaus,* 478 F.2d 615, 632 n. 51 (D.C.Cir.1973). An agency, however, does not have carte blanche to establish a rule contrary to its original proposal simply because it receives suggestions to alter it during the comment period. An interested party must have been alerted by the notice to the possibility of the changes eventually adopted from the comments. *Id. citing Wagner Electric Corporation v. Volpe,* 466 F.2d 1013, 1019 (3rd Cir.1972). Notice is adequate if the changes in the original plan "are in character with the original scheme," and the final rule is a "logical outgrowth" of the notice and comments already given. Id. at 1105 Stated differently, if the final rule "substantially departs from the terms or substance of the proposed rule," the notice is inadequate. *Id.*

The Commission's *Notice of Proposed Rulemaking* did not once mention the passive display of website addresses, let alone regulating them, only the use of direct, interactive website links which can be clicked on to immediately access internet websites. As such, interested parties in broadcasting, advertising, and technology, as well as affected citizens nation-wide who use the internet, did not receive adequate notice and opportunity to comment. Additionally, because the rule adopted was never broached in the *NPRM*, it cannot be described as a logical outgrowth of the proposed rule. Essentially, the Commission proposed regulating an area of technology that is just now emerging and barely used, and instead regulated a basic method of commerce that is widely-used and already deeply entrenched in our society. This explains why the record contains numerous comments on interactive direct links but is devoid of comments related to the passive display of website addresses.

In its Opposition to Petitions for reconsideration CMPC states, "Contrary to the claims of some Petitioners, the FCC complied with the notice requirements of the APA". This claim is supported merely by a single footnote that states the FCC sought comment on whether the Commission should "prohibit all direct links to commercial websites during children's programming" and "as noted by WB, 'website links' can refer to either a passive display or an interactive link." CMPC's Opposition at p.22. (Admittedly, a website link contained on a computer screen from a website or

an email could certainly become a passive display if it is printed out onto a piece of paper.) The FCC's own statements in the *Notice of Proposed Rule Making* and the subsequent *Report and Order* comport with common usage of the term "link" in this setting and make it perfectly clear that "direct links to commercial websites" refers to interactive links that could be clicked-on to allow the user to access a website. Pertinent parts read:

> 29. Background. Another issue posed by the transition from analog to digital broadcasting is how the Commission's children's programming advertising limits and policies will apply to DTV broadcasters. **By converging internet capabilities with broadcasting**, digital television permits a new level of **interactivity** between broadcasters, advertisers, and viewers. This capability offers great potential for enhancing the educational value of children's programs by, for example, permitting children **to click on icons that appear on the screen during the program which take them to websites** with more in-depth information about the topics covered in the program.
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> 32.In addition, CME et al, proposes that the Commission prohibit all **direct links** to commercial websites during children's programming. We invite comment on this proposal. Should the Commission prohibit the use of **digital television interactivity** capability in children's programs to sell products? Is such a prohibition appropriate in light of the unique ability of children to be influenced by commercial matter and their difficulty distinguishing commercials from other programming? If **commercial links** are freely available in programs not subject to our commercial limits (e.g., programs directed at adults and children over the age of 12), would prohibiting them or restricting them in programming directed to children ages 12 and under make this programming less desirable and thus less likely to be selected by children? Should we make a distinction between websites that carry only commercial products, and websites that also offer educational information related to the program? If we permit certain kinds of **direct commercial links** during children's programs, should such links be permitted to appear during the program itself, or be limited to appearing during commercials adequately separated from program material as required by our separations policy? In addition, if we were to allow the use of **direct commercial links**, should we limit the duration of time they appear on the screen? How should the appearance of a **commercial link** be counted in calculating the number of commercial minutes for purposes of our commercial limits? Finally, if we allow certain kinds of **direct commercial links**, should we prohibit **links to websites** that sell products associated with the program in which the **links** appear under our program-length commercial policy, or **links to websites** where a program host is used to sell products? We invite commenters to address all of these issues, as well as any other issues related to the use of **direct website links** during children's programming.

Paragraphs 29,32 of the *Notice of Proposed Rule Making* (2000).

As the reader can plainly see, the proposed rule never once referred to the passive display of website addresses. Furthermore, paragraphs 50-54 of the *Report and Order* makes it perfectly clear that merely displaying internet website addresses on the TV screen is completely different from the appearance of an interactive or direct website link. Pertinent parts read:

> 50. We are aware that some broadcasters are currently displaying Internet website addresses that appear during children's program material (for example, in a crawl at the bottom of screen) which raises the issue of how the CTA commercial time limits should apply. We are concerned that the display of such addresses for websites established solely for commercial purposes in children's programs is inconsistent with our mandate under the CTA to protect children, who are particularly vulnerable to commercial messages and incapable of distinguishing advertising from program material.[1] This is a concern that arises with respect to all broadcasters, both analog and digital, and to cable operators. Accordingly, we adopt a proposal similar to that advanced by Sesame Workshop with respect to this display of commercial website information in children's programs. Specifically, we will interpret the CTA commercial time limits to require that, with respect to programs directed to children ages 12 and under, the display of Internet website addresses during program material is permitted as within the CTA limitations only if the website: 1) offers a substantial amount of *bona fide* program-related or other noncommercial content; 2) is not primarily intended for commercial purposes, including either e-commerce or advertising; 3) the website's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and 4) the page of the website to which viewers are directed by the website address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled "store" and no links to another page with commercial material).[2]

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[1] *See* Senate Report at 9 (noting that young children have a difficult time distinguishing commercials from programming and that the ability to recognize persuasive intent is not developed until about the age of seven to eight years); House Report at 6 (stating that it is "well established" that children are uniquely susceptible to the persuasive messages contained in television advertising).

[2] While the CTA's limits on commercial matter in children's programming do not apply to noncommercial educational television stations, the extent to which these stations may engage in commercial activity is governed by other statutory and regulatory provisions. *See* 47 U.S.C. § 399B; 47 C.F.R. § 73.621. Section 399B permits public stations to provide facilities and services in exchange for remuneration as long as those uses do not interfere with the stations' provision of public telecommunications services. Section 399B does not permit, however, public broadcast stations to make their facilities "available to any person

> 51. For websites meeting these requirements, we will not limit the amount of time that the website address may be displayed during children's programs…
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> 52. We believe that this approach to the display of website addresses …
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> 53. With respect to the **appearance of direct, interactive, links to commercial Internet sites** in children's programming, we agree with those commenters that express concern that prohibiting such links at least at this stage in the digital transition is premature and unnecessary and could hamper the ability of broadcasters to experiment with potential uses of interactive capability in children's programming.[3] There is little if any use of direct Internet connectivity today in television programming of the type that was contemplated when the *Notice* in this proceeding was issued. Accordingly, we find that it would be premature and unduly speculative to attempt to regulate such direct connectivity at this time. We agree that direct links to websites with program-related material could provide beneficial educational and informational content in children's programs and do not wish to place unnecessary barriers in the way of technical developments in this area that may take place.[4]
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> 54. We encourage broadcasters to experiment with the capabilities digital television offers by developing interactive services that can be used to enhance the educational value of children's programming…

Report and Order.

The Commission failed to give adequate notice to satisfy the APA or the policies underlying the notice requirement which include testing the

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for the broadcasting of any advertisement." 47 U.S.C. § 399B(a)(2). In addition, under 47 C.F.R. § 73.621, public television stations are required to furnish primarily an educational as well as a nonprofit and noncommercial broadcast service. 47 C.F.R. § 73.621. *See Ancillary or Supplementary use of Digital Television Capacity by Noncommercial Licensees*, 16 FCC Rcd 19042, 19045, ¶ 7 (2001).

[3] Association of National Advertisers and the American Association of Advertising Agencies ("ANA/AAAA") Comments (Dec. 2000) at 2-3; AAF Comments (Dec. 2000) at 1-4; American Advertising Federation ("AAF") Reply Comments (Jan. 2001) at 4; NAB Comments (Dec. 2000) at 23; National Cable Television Association ("NCTA") Comments (Dec. 2000) at 2; Viacom Comments (Dec. 2000) at v-vi; AOL Time Warner, Inc. ("AOL Time Warner") Reply Comments (Jan. 2001) at 1-3. ANA/AAAA also contends that the policy issues related to links between a children's TV program and a commercial website can be resolved through application of the industry's current self-regulatory program for children's marketing. Specifically, this commenter states that the Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus monitors and reviews children's advertising in all media and addresses particular concerns including host-selling and the distinction between content and advertising. ANA/AAA Comments (Dec. 2000) at 4.

[4] Sesame Workshop Comments (Dec. 2000) at 23-25 (arguing that mixed-use Internet sites can be a valuable means of enhancing the educational value of the related series and of encouraging loyalty to the series, thereby promoting the educational objectives of the CTA).

proposed rule by exposing it to diverse public comment, allowing affected parties an opportunity to express their views, and developing evidence in the record to ensure meaningful judicial review. *Lead Phase-down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983). Therefore, the Commission should immediately rescind the regulations related to the passive display of website addresses.

The Commission's new rules regulating the display of website addresses exceed the agency's authority and jurisdiction

The Commission's new rules impermissibly regulate program content and the internet. The CTA does not give the FCC the authority to regulate the content of children's programming or the internet. Even if the Commission has noble intentions, it may not regulate program content without an explicit delegation of power from Congress. *MPAA v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002). The CTA authorizes the Commission to regulate overcommercialization on TV. It does not extend to regulating the internet. Congress intended the Internet to be "unfettered by Federal or State regulation" as a means "to preserve the vibrant and competitive free market that presently exists". 47 U.S.C. §230(b)(2). Congress has shown that it will regulate the internet directly to protect children where needed;

however, it has not conveyed such authority to the Commission. *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004).

The website display rules do not just regulate the internet- they do so in a vague, burdensome fashion that would prevent most websites from knowing with certainty if they comply in order to display their addresses on TV during children's programs.

"Specifically, we will interpret the CTA commercial time limits to require that, with respect to programs directed to children ages 12 and under, the display of Internet website addresses during program material is permitted as within the CTA limitations only if the website: 1) offers a substantial amount of *bona fide* program-related or other noncommercial content; 2) is not primarily intended for commercial purposes, including either e-commerce or advertising; 3) the website's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and 4) the page of the website to which viewers are directed by the website address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled "store" and no links to another page with commercial material)."

Report and Order ¶50.

The Commission should rescind the new rules regulating the passive display of website addresses. The Commission's failure to provide adequate notice is seriously compounded by its unprecedented foray into the realm of

program content and internet commerce. The Commission has not been directed to regulate program content, nor does it have the authority to regulate the internet, according to Congress and the FCC's own website. *See* <www.fcc.gov/aboutus.html>

Respectfully submitted,

x_____

Frank Jastrzembski
PO Box 651
Sumner, Wa 98390

May 31, 2005